Lower Arkansas Valley WATER CONSERVANCY DISTRICT

January 20, 2016

Board of County Commissioners Pueblo County 215 W. 10th Street Pueblo, Colorado 81003



Re: City of Colorado Springs' Southern Delivery System

Dear Commissioners:

The Contracts between the United States of America and the City of Colorado Springs for the Use of Excess Capacity in the Facilities of the Fryingpan-Arkansas Project (No. 11XX6C002) and for the Operation, Maintenance, and Replacement Costs Associated with the North Outlet Works, a Facility of the Fryingpan-Arkansas Project (No. 11XX6C0005), pursuant to Reclamation's "Record of Decision For the Southern Delivery System, Final Environmental Impact Statement, Record of Decision Reference No.: GP-2009-01" (Mar. 20, 2009), require that that SDS Participants "Comply with all applicable permits, regulations, and laws including but not limited to CDPHE [Colorado Department of Public Health and Environment], USCOE 404, and local land use permits obtained for the SDS project." Excess Capacity Contract, at ¶ 13(a); Outlet Works Contract, at ¶ 9(a); ROD, at 12.

The U.S. Environmental Protection Agency ("EPA") has referred claims to the U.S. Department of Justice for potential legal action against the City of Colorado Springs, Colorado ("City") for violations of Section 402 of the Clean Water Act, 33 U.S.C. § 1342. The State of Colorado has joined with the United States in pursuing enforcement of this matter. The claims specifically relate to the City's MS4 [stormwater] Permit No. COS-000004 issued by CDPHE. See letter from Heidi Hoffman, Trial Attorney, Environmental Enforcement Section, EPA, to Wynetta Massey, City Attorney, City of Colorado Springs, re: Clean Water Act Violations at City of Colorado Springs, Colorado MS4 (Nov. 5, 2015).

As you know, Pueblo County's 1041 Permit for SDS – the local land use permit –states that:

"At all times water is delivered through the Southern Delivery System, the Applicant, including all participants, shall maintain stormwater controls and other regulations intended to ensure that Fountain Creek peak flows and runoff volumes received from development served by the SDS project are no greater than existing conditions, or at levels as appropriate to prevent damage to presently existing downstream facilities."

See Pueblo County 1041 Permit, p. 14 of 28. EPA's enforcement action brings into question whether the City can or will meet this condition of its local land use permit, as required by the Contracts and ROD.

The Lower Ark District believes that EPA's enforcement action evidences that the City is not in compliance with "all applicable permits, regulations, and laws including but not limited to CDPHE, USCOE 404, and local land use permits obtained for the SDS project." Reclamation accordingly should not allow the conveyance of SDS Water for the use of the City through SDS until the City is in full compliance with its MS4 Permit and 1041 Permit.

The Lower Ark District's position is that the City of Colorado Springs alone is in violation of the Contracts and ROD, and wishes to emphasize that it does not believe that other SDS Participants, specifically the City of Fountain and the Security Water District, are in violation of the Contracts and ROD as EPA's enforcement action is limited to the City of Colorado Springs. Conveyance of SDS Water to non-City Participants through SDS should not accordingly be affected by EPA's enforcement action or Reclamation's enforcement of its Contracts and ROD.

Sincerely,

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Lynden Gill, President

cc: City of Pueblo, Colorado Bureau of Reclamation January 20, 2016

Dear Mr. Roy Vaughn,

The Record of Decision issued for the Southern Delivery System in 2009 was predicated on the existence of a stormwater enterprise in Colorado Springs that would not only address ongoing and future flooding issues on Fountain Creek, but that would also attempt to rectify existing maintenance needs and meet federal and state water quality permits.

In a Jan. 22, 2009, letter from Larry Svoboda, EPA Region 8 director, the EPA commented on the ROD and its ongoing concerns that water quality on Fountain Creek and other downstream water bodies would continue to be monitored. At the minimum, the EPA said Reclamation would require annual compliance reports through the adaptive management program. The letter also references increased flows in Fountain Creek causing water quality impacts that are not addressed in Reclamation's final EIS.

In reviewing the compliance reports issued in 2013 and 2014, stormwater control appears to be a moving target for Colorado Springs Utilities.

In the 2013 report, Utilities presented a rosy view of the future, saying: "Colorado Springs Utilities continues to work cooperatively with the City of Colorado Springs, El Paso County and other regional governmental entities as part of a Stormwater Task Force effort." It goes on to enumerate the benefits of a regional approach to water quality.

In the 2014 report, Utilities was less optimistic, because voters had rejected the regional drainage district in the November election. It said: "Colorado Springs Utilities continues to work cooperatively with the City of Colorado Springs, El Paso County and other regional governmental entities as part of an effort to identify a sustainable, long-term funding solution for addressing stormwater control needs.

By using nearly the same language to report much different expected outcomes, these comments indicate that Utilities is content to dance around the stormwater issue while paying gratuitous lip service about how they intend to meet federal standards.

The truth is, the City of Colorado Springs and Colorado Springs Utilities have not met federal requirements. Worse, from the city's perspective, there has been a deliberate lack of intent, as illustrated in the 2015 EPA Audit of the city's MS4 permit.

Since 2009, when Colorado Springs City Council chose to abolish the city's stormwater enterprise, Utilities and the city's politicians have tried to talk a good game. They point to a Drainage Criteria Manual that would create best management practices for new development and the the continued minimal compliance with the MS4 permit.

In fact, the EPA Audit found that neither of those outcomes is happening. Comments from city staff to the EPA revealed that the city has not spent the money to live up to its minimal drainage standards and has not had the political will to require developers to follow the manual its staff developed. Ironically, through its 1041 permit with Pueblo County, Colorado Springs Utilities requires other communities who would use SDS to meet those requirements, as well as having a sustainable funding source for stormwater control, similar to the one Colorado Springs Council abolished.

The events have not gone unnoticed in Pueblo County, which continues to suffer the impacts of upstream development on Fountain Creek.

The Pueblo City Council and Pueblo Board of Water Works are both in the process of passing resolutions that would hold Colorado Springs Utilities to its 2004 Intergovernmental Agreement to meet the conditions of its federal water quality permits. Those resolutions also would cite the lack of a permanent stormwater source since 2009.

Other than the current political actions taking place, Colorado Springs lack of attention to controlling flood water entering Fountain Creek is having consequences on real projects, and could be affecting other conditions of the ROD.

The rains which blanketed Southern Colorado in May and June of 2015 swelled flows on Fountain Creek for several weeks. In the process, the wetlands mitigation project at Clear Springs Ranch was overcome with sediment and debris that effectively nullified a \$4 million-plus effort of Utilities to comply with the ROD and FEIS.

A subsequent study by Wright Engineering for Pueblo County found this was no isolated incident. Each year, 370,000 tons of sediment are stranded between Colorado Springs

and Pueblo, changing the course of Fountain Creek and creating perilous erosion conditions in El Paso County, Pueblo County and within Pueblo city limits. The study ties this increase directly to the growth that has occurred in Colorado Springs since 1980.

Growth enabled by the SDS pipeline will only exacerbate this situation.

EPA has placed trust in implementing stormwater control and water quality guidelines in the Bureau of Reclamation through the SDS contract process. To quote Mr. Svoboda's Jan. 22, 2009, letter:

"Reclamation would ensure these measures are implemented through terms and conditions of any long-term contract between Reclamation and the Participants."

Reclamation rejected the idea that SDS would accelerate growth, but in the ROD and the SDS contract, Reclamation requires Colorado Springs to comply with other permit conditions not spelled out in the FEIS.

Reclamation intended this when it stated: "The participants MUST obtain other significant Federal, State and local permits, approvals, and agreements for the SDS Project."

The remedy included in the FEIS and ROD is a cyclical process called "adaptive management," which was used as a catch-all shield against numerous public criticisms of SDS during public comment periods. To our understanding, the process works like this: A problem is identified; affected parties sit down and talk about it; the problem gets fixed.

The flaw in this process is that it does not identify who should bring the affected parties to the table, whether it occurs in a boardroom or a courtroom and what sort of arbitration would apply.

Our view is that Reclamation has the authority to review its contract for SDS with Colorado Springs, to determine whether all parts of that contract are in compliance and to withhold or retract any actions identified in that contract at any time.

Clearly, the City of Colorado Springs and Colorado Springs Utilities are not in compliance with their commitment to contain stormwater and the contract should be suspended until they can show a will to sustain stormwater control.

Sincerely,

Lynden Gill, President

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